AGROKOR SDN BHD v. PERKAYUAN TM (M) SDN BHD; THNG BAY SNG & ORS, PARTNERS OF LEGAL FIRM AZAM MALEK & SOH (THIRD PARTIES)

HIGH COURT MALAYA, SHAH ALAM
LIM CHONG FONG JC
[CIVIL SUIT NO: 22NCVC-299-06-2014]
24 APRIL 2015

CONTRACT: *Construction of terms of contract – Contract for sale of land – Word 'any reason whatsoever' – Intention of parties – Fulfilment of obligation – Whether include any reason caused or contributed by parties to an agreement – Whether include any reason within obligation and power of parties to eliminate – Whether limited to supervening neutral reason beyond reach of parties to deal with*

CONTRACT: *Time – Completion date – Performance of contractual obligation within stipulated period in agreement – Whether time was of the essence – Act of prevention by one party to a contract – Blatant disregard of vendor to remove caveat – Delay in obtaining consent to transfer by vendor – Reasonable time for completion – Whether completion period as prescribed in agreement still applicable – Whether time was set at large – Whether parties could complete agreement beyond agreed completion date*

CONTRACT: *Breach – Remedies – Specific performance – Sale of land – Repudiatory breach of contract – Unlawful termination of agreement by vendor – Purchaser refused to accept vendor's repudiation of agreement – Right of innocent party – Whether purchaser entitled to seek for specific performance against vendor*

TORT: *Damages – Exemplary damages – Unjust enrichment – Vendor holding on and benefited from unauthorised usage of deposit money – Repudiatory breach of contract by vendor – Whether purchaser entitled for exemplary damages as result of unjust enrichment by vendor from usage of deposit money*

CIVIL PROCEDURE: *Third party proceedings – Indemnity – Contribution from third party – Negligence – Duty of care by solicitors – Whether indemnity or contribution could be claimed in absence of breach of duty of care*

This suit was brought by the plaintiff, the purchaser of two pieces of land with factories built thereon ('the properties') against the defendant, the vendor for wrongful termination of sale and purchase agreement dated 30 January 2013 in respect of the properties ('the agreement'). The defendant in turn brought in its conveyancing solicitors as third parties for indemnity and/or contribution. It was an explicit term of the agreement that the sale and purchase of the properties was condition precedent to the written consent of the Selangor State Authority ('State Authority') for the sale and transfer of Lot 9177 in favour of the plaintiff ('transfer consent'). It was further agreed that the defendant was required to obtain the transfer consent within six months from the date of the agreement, subject to further extension of three

A months, and in the event the said transfer consent is not obtained, the agreement shall be deemed mutually terminated. Pursuant to the said agreement, the plaintiff paid RM1 million being the 10% deposit to the defendant. Upon execution of the agreement, the plaintiff's solicitors had forwarded to the third parties the necessary documents for conveyance of the
B properties. On 5 March 2013, the plaintiff lodged a private caveat on the properties to protect its interest in the said properties. After numerous reminders from plaintiff's solicitors, only on 12 April 2013, the defendant, through the third parties, filed the application for transfer consent to the State Authority. However, at the time of the filing of the said application for
C transfer consent, the third parties had discovered the existence of a private caveat lodged on Lot 9177 by a company known as Halaman Seri Sdn Bhd and subsequently the third parties informed the defendant accordingly. However, the defendant had instructed the third parties not to disclose to the plaintiff about the lodgment of the said private caveat by Halaman Seri Sdn
D Bhd. Instead, *vide* letter dated 20 November 2013, the third parties on the instruction of the defendant had written to the plaintiff's solicitors treating the agreement as being mutually terminated by reason of an inability to obtain the transfer consent. Hence, this suit by the plaintiff, seeking for declaration that the agreement was still valid and enforceable and further for specific performance of the agreement and in the alternative for damages. In
E defence, the defendant contended that as the condition precedent was never fulfilled within the prescribed period, the defendant had treated the agreement as mutually terminated. The defendant denied liability and if found liable, the defendant sought indemnity or contribution from third parties by reason of non-fulfilment of the condition precedent due to the
F delay and negligence of the third parties. The defendant also filed a counter-claim against the plaintiff for removal of the plaintiff's private caveat lodged on 5 March 2013. The third parties, on the other hand, denied they were negligent and instead blamed the defendant for the non-fulfilment of the condition precedent. The issues before the court resolved on the construction
G of the agreement to determine the defendant's breach of the terms of the agreement and the conduct of parties in the course of the performance of the agreement.

Held (allowing plaintiff's claim; dismissing defendant's counter-claim and claim against third parties):

H **(1)** The commercially sensible construction of the words 'any reason whatsoever' should necessarily exclude any reason caused or contributed by the parties to the agreement or any reason which were within their obligation and power to alleviate or eliminate. Its applicability is limited to a supervening neutral reason beyond reach of
I the parties to deal with it. This must have been the presumed intention of the parties on an objective construction and resonates the maxim 'one

cannot take advantage of his own wrong'. Thus, cl. 1A.1 and 1A.3 must be read in conjunction with cl. 10 of the agreement where there is a breach by the defendant. (paras 45 & 46)

(2) It was incumbent upon the defendant to remove the private caveat lodged by Halaman Seri Sdn Bhd. The defendant however procrastinated in getting the caveat removed from 18 April 2013 to 27 May 2013 despite having been informed of the existence of the caveat by the third parties. Although the defendant had ultimately taken steps to remove the private caveat, it was obviously not done in a reasonable and timeous manner to meet the completion date stipulated in the Agreement. In fact, it was calculated and timed to surpass the original completion date of the Agreement. It was a blatant act of prevention by the defendant. By reason of the conduct of the defendant in relation to the removal of the caveat that constituted an act of prevention, the time for completion of 30 October 2013 as prescribed in the agreement was no longer applicable. In other words, time was set at large and the parties were bound only to complete the agreement within a reasonable time beyond 30 October 2013. (paras 50, 53 & 56)

(3) The defendant was not entitled to treat the agreement as mutually terminated in reliance on cl. 1A.1 and 1A.3 thereof as communicated to the plaintiff on 20 November 2013. The defendant ought instead to have accepted the offer for an extension of time proposed by the plaintiff on 2 December 2013 to complete the agreement, otherwise the law prescribes reasonable time for completion to be ascertained from the prevailing facts and circumstances. (para 57)

(4) The defendant's conduct was tantamount to a repudiatory breach and an unlawful attempted termination of the agreement. The repudiation was not accepted by the plaintiff. Hence, the plaintiff being the innocent party was entitled to exercise its rights thereunder including cl. 10.1 of the agreement. (para 58)

(5) The defendant has undoubtedly been unjustly enriched by holding on and benefited from the unauthorised usage of the deposit of RM1 million. If specific performance of the agreement is granted, only then the deposit would go towards the payment for the properties. In the meantime, the defendant had wrongly and unjustly benefited from the free use of the deposit sum. Consequently, this is an appropriate case to award exemplary damages to the plaintiff because of the defendant's repugnant conduct for committing repudiatory breach of contract that was self engineered in an attempt to extricate itself from the agreement as well as for unjust enrichment by unlawful withholding the refund of the deposit for its own profitable use. (paras 70 & 71)

A **(6)** The delay was in fact caused by the defendant itself and not the third parties. Thus, although the third parties owed a two pronged duty of care to the defendant, the third parties did not breach that duty of care. Consequently, the relief for indemnity or contributory as sought by the defendant against the third parties for negligence must necessarily fail
B because one of the three essential ingredients of the tort was not established. (para 75)

Case(s) referred to:
Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***
Chin Tai v. Siow Shiow & Ors [1970] 1 LNS 15 FC ***(refd)***
C *Dato' Wong Gek Meng v. Pathmanathan Mylvaganam & Ors [1998] 1 CLJ 625 HC* ***(foll)***
Hong Leong Nominees Sdn Bhd & Anor v. Tommy Lim Boon Cheow & Anor; Lachaman Lalchand & Assoc (Third Party) [2000] 1 CLJ 125 HC ***(foll)***
Hotel Anika Sdn Bhd v. Majlis Daerah Kluang Utara [2006] 4 CLJ 981 HC ***(refd)***
Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd [2009] 6 CLJ 626 CA ***(refd)***
LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor [2007] 2 CLJ 434 CA ***(refd)***
D *MMI Industries Sdn Bhd v. Let Sin Industries Sdn Bhd [2010] 1 CLJ 36 CA* ***(refd)***
Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA ***(refd)***
Rookes v. Barnard [1964] AC 1129 ***(refd)***
Sim Chio Huat v. Wong Ted Fui [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 FC ***(refd)***
Su Wee Lip @ Phillip Su v. Hj Lassim Abdul Rahman [2009] 1 MLJ 580 ***(refd)***
Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals [1997] 2 CLJ 607 CA ***(refd)***
E *Thamesa Designs Sdn Bhd & Ors v. Kuching Hotels Sdn Bhd [1993] 4 CLJ 12 SC* ***(refd)***
Yeo Liong Ho v. Loh Choon Hooi [2010] 2 CLJ 580 CA ***(refd)***

Legislation referred to:
National Land Code, ss. 326, 327
F Specific Relief Act 1950, ss. 21, 23

For the plaintiff - Silas M Seenivasagam (Ravikumar Arumugam with him); M/s Azariah & Assocs
For the defendant - Chong Joo Thian (Nur Adilahkamarzaman with him); M/s JT Chong & Assocs
G *For the third parties - Lim Kian Leong (Chai Jia Hui with him); M/s Lim Kian Leong & Co*

Reported by Thirunavakarasu Vijayan

JUDGMENT

H

Lim Chong Fong JC:

Introduction

[1] This is a suit brought by the purchaser against the vendor of two pieces of land in Klang with factories built thereon for wrongful termination of the
I sale and purchase agreement. The vendor in turn brought in its conveyancing solicitors as third parties for indemnity or contribution.

[2] The plaintiff, a private limited company is the purchaser of the lands known as:

(i) Pajakan Mukim 4125, Lot 9177, Mukim Klang, Daerah Klang, Selangor ("Lot 9177"); and

(ii) Pajakan Mukim 4419, Lot 9178, Mukim Klang, Daerah Klang, Selangor ("Lot 9178")(both Lot 9177 and Lot 9178 collectively referred to as "the properties").

[3] The defendant, a private limited company is the registered owner and vendor of the properties.

[4] The third parties is a firm of advocates and solicitors appointed by the defendant to undertake the conveyance of the properties.

The Trial Process

[5] The main suit and third parties suit were heard together and the trial took two days on 14 and 15 January 2015.

[6] The trial documents were mark as bundles A, B1 to B3, C1 and C2 and D1 and D2. The documentary evidence contained in bundles B1 to B3 was by consent classified as status B unconditionally. In addition, exhs. P1, P2, D3, D4, D4(a) and P5 were admitted in evidence during the course of the trial.

[7] The parties called the following witnesses who gave sworn testimonies:

Plaintiff

(i) Hee Cher Sun (PW1), an advocate and solicitor who was appointed by the plaintiff to undertake the conveyance of the properties for the plaintiff; and

(ii) Lai Sak Coon (PW2), an executive director of the plaintiff.

Defendant

(i) Ong Chwee Yen (DW1), a director of the defendant; and

(ii) Chan Kok Jin (DW2), another director of the defendant.

Third Parties

(i) Soh Yu Hsing @ Soh Yu Keat (TPW1), a partner of the third parties firm.

[8] After the trial, the parties submitted their respective written closing arguments in chief and in reply. There was oral clarification by counsel on 25 March 2015. The defendant and third parties thereafter submitted further written submissions as requested by the court.

A **Background Facts**

[9] By a sale and purchase agreement dated 30 January 2013 ('agreement'), the plaintiff purchased the properties from the defendant for a consideration of RM10 million.

B **[10]** The agreement contained the following material terms:

Consent Transfer

1A.1 Notwithstanding anything to the contrary herein express or implied, it is hereby expressly agreed that the sale and purchase of the Property hereunder is subject to the written consent of Pihak Berkuasa Negeri,
C Negeri Selangor (hereinafter referred to as the "Said Authority") for the sale and transfer of the Lot 9177 Land by the Vendor in favour of the Purchaser (hereinafter referred to as the "Transfer Consent") being obtained within a period of six (6) months from the date hereof and further extension of three (3) months in the event that the Transfer Consent is still not obtained. In the event that the Transfer Consent is
D not obtained within this further period, then, this Agreement shall be deemed terminated mutually and both parties shall have no claims whatsoever against each other and Clause 1A.3 shall then take precedence. In this respect, the Vendor's Solicitors shall deliver the requisite forms and declarations in connection with the application of the
E Transfer Consent to the Purchaser's Solicitors for the execution of the same by the Purchaser.

1A.3 If for any reason whatsoever the Vendor's application for the Transfer Consent is rejected or is not obtained by the Vendor within the period of six (6) months from the date hereof subject to further extension of time as per Clause 1A.1 above, then, this Agreement shall be deemed
F terminated mutually whereupon.

Warranties and Undertakings by the Vendor

6.1 The Vendor hereby warrants and undertakes with the Purchaser that:

(c) the Vendor has not entered into any other arrangement with any
G third party for the sale of the Property or has in any way disposed of any interest in the Property, and shall not after the date hereof enter into or cause to be entered into any such arrangement;

(f) the Property is not subject to any covenants, obligations, restrictions or conditions which are of an unusual or onerous nature or which
H would affect the use or continued use of it for the purposes for and extent to or the manner in which it is now used;

(g) the Property is sold free from encumbrances, liens, charges, caveats, prohibitory orders, trusts, equities, easements and conflicting interests and other restraints whatsoever.

I 6.2 The Vendor acknowledges and agrees that the Purchaser has entered into this Agreement in reliance on the warranties set out in Clause 6.1.

Non-Completion by Vendor

10.1 To specific performance of this Agreement by the Vendor, but without prejudice to the Purchaser's right to damages.

14. Time

Notwithstanding anything to the contrary, express or implied, contained in this Agreement or provided by law, time is of the essence of this Agreement.

[11] Pursuant to the agreement, the plaintiff paid RM1 million being the ten percent deposit to the defendant.

[12] After the execution of the agreement, the plaintiff's solicitors, Messrs CS Hee & Co by letter dated 5 February 2013 forwarded to the defendant's solicitors, the third parties the required documents duly executed by the plaintiff for the conveyance of the properties. The plaintiff's solicitors also in the same letter and again by letter dated 27 March 2013 to the third parties enquired on the status of the application to the State authority for consent to transfer of Lot 9177. There was no reply from the third parties. In the meantime, the plaintiff on 5 March 2013 lodged a private caveat on the properties.

[13] The defendant nevertheless through the third parties only on 12 April 2013 made the application to the State authority *vide* the Klang Land Registry for consent to transfer of Lot 9177.

[14] At the time of the filing of the aforesaid application, the third parties discovered from the Klang Land Registry of the existence of a private caveat lodged by a Halaman Seri Sdn Bhd on Lot 9177 and accordingly informed the defendant on 18 April 2013.

[15] The defendant on 22 April 2013 however instructed the third parties not to disclose to the plaintiff about the lodgment of the aforesaid private caveat.

[16] On 16 May 2013, the Klang Land Registry wrote to the third parties that the defendant's application for consent to transfer of Lot 9177 was incomplete without the letter of consent of Halaman Seri Sdn Bhd who had lodged the private caveat on Lot 9177.

[17] The third parties on the instruction of the defendant only then on 18 May 2013 wrote to the plaintiff's solicitors about the aforesaid private caveat.

[18] On 27 May 2013, TPW1 met and informed DW1 of the defendant that the third parties did not have the litigation expertise to remove the private caveat and advised the defendant to consult other lawyers.

[19] DW1 again met TPW1 only on 10 July 2013 and requested the third parties to recommend a lawyer to the defendant to advise on the removal of the private caveat. The third parties recommended Miss Sia Siew Mun an advocate & solicitor to the defendant.

[20] After consulting other lawyers, the defendant on 29 July 2013 instructed the third parties to apply to remove the private caveat by adopting the process through the land registry pursuant to s. 326 of the National Land Code instead of that by court action pursuant to s. 327 of the National Land Code.

[21] Accordingly the third parties on 28 August 2013 filed the application to remove the private caveat by serving a form 19H on the Klang Land Registry.

[22] The plaintiff's solicitors in the meantime sent numerous letters dated 5 June 2013, 12 June 2013, 13 September 2013 and 25 September 2013 to enquire on the action taken by the defendant to remove the private caveat. There was neither response by the third parties nor the defendant.

[23] The Klang Land Registry subsequently on 26 September 2013 served a form 19C notice on Halaman Seri Sdn Bhd.

[24] By letter dated 20 November 2013, the third parties on the instruction of the defendant wrote to the plaintiff's solicitors treating the agreement mutually terminated as provided in the agreement by reason of the inability to obtain the consent to transfer from the Klang Land Registry.

[25] The plaintiff's solicitors on 2 December 2013 wrote to the third parties to grant a further nine months extension of time to the defendant to obtain the consent to transfer of Lot 9177. The defendant however rejected it *vide* the third parties' letter dated 23 December 2013.

[26] By the plaintiff's solicitors' further letter dated 15 January 2014 to the third parties, the plaintiff objected to the termination of the agreement and demanded that the defendant honoured the agreement. The plaintiff again reiterated its demand through its new solicitor, Messrs Azariah & Associates letter to the defendant dated 26 May 2014.

[27] The defendant however failed, refused or neglected to retract its termination of the agreement. Further the defendant has todate retained the deposit of RM1 million paid by the plaintiff.

[28] The plaintiff accordingly commenced this suit on 16 June 2014.

Contentions Of The Plaintiff

[29] The plaintiff's contention in crux is that the defendant had at all material times acted *mala fide* in breach of contract in the course of the performance of the agreement as well as the ultimate act of treating the agreement as mutually terminated. In respect of the former, it was submitted

that the defendant firstly delayed in the filing of the application to the State authority for consent to transfer the properties, secondly instructed the third parties not to inform the plaintiff on the existence of the private caveat lodged by Halaman Seri Sdn Bhd, a company that is connected with the defendant by virtue of family relationship amongst the directors of the respective companies and thirdly delayed in making the application to remove the private caveat. As to the latter, the defendant then took advantage of the subsistence of the private caveat that resulted in the non-obtaining of the consent to transfer the properties to treat the agreement as terminated because the consent to transfer was not obtained within the prescribed time.

[30] Hence the plaintiff sought specific performance of the agreement which the plaintiff was always ready and willing to perform but for the unlawful termination by the defendant. Besides the plaintiff claimed against the defendant for damages too.

Contentions Of The Defendant

[31] In defence, the defendant contended that the agreement was subject to the condition precedent that the consent to transfer by the State authority must be obtained for Lot 9177 within nine months from the date of the agreement; *to wit* by 30 October 2013.

[32] For the purposes of application for the aforesaid consent to transfer and by the provisions of the agreement, the prior written consent of Tenaga Nasional Bhd ('TNB') was required to accompany the application. The third parties only obtained the consent from TNB on 21 March 2013. The plaintiff had also entered a private caveat on the properties and the plaintiff only gave its consent to the transfer of the properties on 18 April 2013.

[33] Nevertheless unknowing to the defendant, Halaman Seri Sdn Bhd had also entered a private caveat on Lot 9177 but the private caveat could not be removed in time. By the letter from the Klang Land Registry dated 16 May 2013, the file for the application for consent to transfer was closed on 31 May 2013. There was no provision in the agreement for making an appeal or fresh application for consent to transfer; hence the agreement was rendered null and void for non-fulfilment of the condition precedent on 31 May 2013.

[34] Since the condition precedent was never fulfilled by the prescribed date of 30 October 2013, the defendant on 20 November 2013 treated the agreement as mutually terminated in reliance on cl. 1A thereto. As the result of the mutual termination, the defendant also counterclaimed for the removal of the private caveat earlier lodged by the plaintiff on 5 March 2013 to protect its interest in the properties.

[35] In the premises, the defendant submitted that it was not liable to the plaintiff but if the defendant should be found liable, the defendant sought indemnity or contribution from the third parties by reason that the non fulfilment of the condition precedent was caused by the negligence of the third parties.

Contentions Of The Third Parties

[36] The third parties denied that they were negligent as so alleged by the defendant and contended that the non fulfilment of the condition precedent was instead caused by the defendant.

[37] In addition, the third parties submitted that there was no proof of loss or damage suffered by the defendant even if the defendant was liable to the plaintiff.

Issues For Determination

[38] Between the plaintiff and the defendant, the principal issue can be narrowed down to the termination of the agreement. This is however dependent on two broader sub issues on the interpretation of the agreement and conduct of the parties in the course of the performance of the agreement. Hence these sub issues must logically be addressed first before dealing with the principal issue. After the determination of the principal issue, the consequences and remedies arising therefrom would then be dealt with finally.

[39] As between the defendant and the third parties, the sole principal issue is that of the alleged negligence of the third parties which is dependent on the outcome of the principal issue between the plaintiff and the defendant. Likewise, the consequences therefrom on indemnity or contribution by the third parties would then be dealt at the end.

Findings Of The Court

Interpretation Of The Agreement

[40] The provisions in the agreement that was heavily relied upon by the defendant are cl. 1A.1 and cl. 1A.3 read together.

[41] By cl. 1A.1, the defendant submitted that the agreement expired by effluxion of time on 30 October 2013 because it was expressly provided that the agreement is deemed mutually terminated. According to the defendant, cl. 1A.1 of the agreement made it crystal clear that "notwithstanding anything to the contrary herein express or implied", if the consent of the State authority "is not obtained" within the prescribed period of nine months, the agreement shall be "deemed terminated mutually".

In addition, cl. 1A.3 stipulated the occurrence of either one of the following events where the agreement will be "deemed terminated mutually":

(i) firstly, in the event the application for the consent of the State authority is 'rejected' by the State authority for 'any reason whatsoever'; or

(ii) secondly, in the event the consent of the State authority 'is not obtained' within the prescribed period for 'any reason whatsoever'.

Based on the defendant's submission, the words 'is not obtained' and the word 'rejected' appearing in cl. 1A.3 should be read disjunctively to cover different situations because of the word 'or' appearing between them. Furthermore the words 'is not obtained' are of wider import and meaning than the word 'rejected'. Those words are capable of including a situation where the consent is not obtained as the result of the existence of a caveat on the properties because of the words 'any reason whatsoever' appearing in cl. 1A.3. In addition, the words 'any reason whatsoever' are very wide in its meaning and purport including a supervening event such as the existence of a caveat or by reason of the failure to submit the letter of consent from the caveator required by the land registry.

[42] The defendant relied on the *dicta* of Jeffery Tan J (as he then was) in *Hotel Anika Sdn Bhd v. Majlis Daerah Kluang Utara* [2006] 4 CLJ 981; [2007] 1 MLJ 248 as follows at p. 1001 (CLJ); pp. 262-263 (MLJ):

> [27] Words are construed, in their grammatical and ordinary sense, unless that would lead to some absurdity, or some repugnance or inconsistence with the rest of the instrument, in which case the grammatical and ordinary sense may be modified, so as to avoid that absurdity and inconsistency, but no further (see *Grey v. Pearson* (1857) 6 HL Cas 61 per Lord Wensleydale); the ordinary meaning of a word is its meaning in its plain, ordinary and popular sense, unless the context points out some special and particular sense (see *Robertson v. French* (1803) 4 East 130). In the case of a word with both an ordinary and a specialised meaning, the popular meaning will prevail unless it is proved first that the parties intended to use the word in the specialised sense.

[43] The plaintiff retorted that the words 'any reason whatsoever' cannot be construed to include actions by the defendant that would defeat the completion of the agreement. Furthermore cl. 1A.3 must be read in conjunction with cl. 10 of the agreement that conferred the right of specific performance to the plaintiff if the defendant for "any reason whatsoever fails or refuses to perform or comply with all its obligations under this agreement …".

[44] In the Federal Court case of *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597, Gopal Sri Ram FCJ said as follows at p. 280 (CLJ); pp. 606-607 (MLJ):

> Before addressing these issues there is an important observation that needs to be made. It is this. The agreement in the present case is one that is not regulated by statute. In short, it is not a contract governed by the housing development legislation. The appellant and respondent were therefore at complete liberty, in accordance with the doctrine of freedom

A of contract to agree on any terms they thought fit. **The role of the court is to interpret the contract in a sensible fashion**. See *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 1 LNS 37; [1987] 2 MLJ 1. As Lord Steyn said in *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] AC 749 at p 771:

B *In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations*
C *and undue emphasis on niceties of language*. In contradistinction to this modern approach, Lord Greene MR's judgment in *Hankey v Clavering* [1942] 2 KB 326 is rigid and formalistic. (emphasis added)

[45] I am of the view that the defendant adopted the antiquated rigid and formalistic approach in construing the agreement herein. The commercially
D sensible construction of the words 'any reason whatsoever' should necessarily exclude any reason caused or contributed by the parties to the agreement or any reason which were within their obligation and power to alleviate or eliminate. In other words, its applicability is limited to a supervening neutral reason beyond reach of the parties to deal with it. This
E must have been the presumed intention of the parties on an objective construction and resonates the maxim "one cannot take advantage of his own wrong". This is made clear also by Gopal Sri Ram JCA (as he then was) in *Su Wee Lip @ Phillip Su v. Hj Lassim Abdul Rahman* [2009] 1 MLJ 580 at p. 590:

F It is a settled principle of general application that a person should not be permitted to take advantage of his own wrong. When applied in the sphere of contract law it expresses itself in the proposition that a guilty party ought not to be permitted to take advantage of his own breach of the contract.;

G see also *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577.

[46] Accordingly, I accept the plaintiff's submission that cls. 1A.1 and 1A.3 must be read in conjunction with cl. 10 of the agreement where there is a breach by the defendant.

H **Conduct Of The Parties In The Course Of Performance Of The Agreement**

[47] It is clear from the agreement that the obligation was on the defendant to obtain the consent to transfer Lot 9177 from the State authority.

[48] Although the agreement was executed on 30 January 2013, the
I application was only lodged on 12 April 2013. This was attributed to several reasons including awaiting the receipt of the written consent from TNB which was necessary to accompany and support the application. The late

receipt of the TNB consent was not attributed to the fault of any of the parties to the agreement. More pertinently from the evidence adduced, it is not disputed that the lodgment of the application on 12 April 2013 was still well within the time to obtain the consent to transfer from the State authority by 30 October 2013.

[49] The real problem stemmed from the lodgment of the private caveat by Halaman Seri Sdn Bhd on Lot 9177 on 8 April 2013. Although DW1 denied that the defendant was connected to Halaman Seri Sdn Bhd, I disbelieve her testimony from her demeanor and manner of answering this point. To my mind, the timing of the lodgment of the private caveat as well as the family relationship of the directors of the companies as revealed from the company searches are suggestive of collusion between the defendant and Halaman Seri Sdn Bhd to enable the defendant to thwart the timeous completion of the agreement. I also took into consideration the defendant's conduct in instructing the third parties not to reveal the existence of the private caveat to the plaintiff as soon as it was discovered.

[50] Be that as it may, it was nonetheless incumbent upon the defendant to remove the private caveat. The defendant however procrastinated in getting the caveat removed. In this regard, the defendant did nothing from 18 April 2013 to 27 May 2013 despite after having been informed of the existence of the caveat by the third parties. The defendant only met the third parties on 27 May 2013 but the third parties made it very clear that they did not have the expertise in civil litigation including caveat removal. It was appropriate and reasonable for them to do so as professional men. Again the defendant did nothing from 27 May 2013 to 9 July 2013 save perhaps to search for an alternative lawyer. Then the defendant met the third parties on 10 July 2013 again to seek the third parties recommendation of a lawyer to undertake the caveat removal. The third parties suggested to the defendant to look for a Miss Sia Siew Mun, an advocate and solicitor. However, after having obtained legal advise from other lawyers, the defendant then only on 29 July 2013 instructed the third parties to remove the caveat through the land registry pursuant to s. 326 of the National Land Code. The third parties made the application on 28 August 2013 that was only administrative in nature, simply through the service of form 19H compared to the application in court pursuant to s. 327 of the National Land Code.

[51] It is clear following the prescribed procedure in s. 326 that the caveat would lapse after the expiry of two months from the service of form 19C on the caveator unless the caveator obtained a court order for extension. The form 19C was served on Seri Halaman Sdn Bhd on 26 September 2013. In other words, the caveat unless extended would be deem removed only on 25 November 2013 but that is beyond the completion date of the agreement of 30 October 2013.

[52] In the meantime, the plaintiff was kept in the dark because neither the defendant responded nor the third parties were instructed by the defendant to respond to the plaintiff's solicitors' letters dated 5 June 2013, 12 June 2013, 13 September 2013 and 25 September 2013 enquiring about the outcome of the caveat removal.

[53] In the circumstances and although the defendant had ultimately taken steps to remove the private caveat, I am of the view and so find that it was done as mere 'window dressing'. It was obviously not done in a reasonable and timeous manner to meet the completion date stipulated in the agreement. In fact, it was calculated and timed to surpass the original completion date of the agreement. I find and hold that it was a blatant act of prevention by the defendant. I am also mindful the defendant has attempted to argue that it did not matter because the Klang Land Registry had effectively closed the application for the consent to transfer on 30 May 2013 by letter dated 16 May 2013. In other words, the consent wasn't and would never be obtained, thereby the invocation of cls. 1A.1 and 1A.3 of the agreement was automatically attracted! I find the defendant's argument misconceived because I construe the letter simply to mean that the land registry's file would be kept in abeyance unless re-activated if and when the letter of consent to remove the caveat or a removal order is obtained and subsequently notified to the land registry.

[54] The legal consequence of an act of prevention on the contractual time for performance where time is of the essence was explained in the Federal Court case of *Sim Chio Huat v. Wong Ted Fui* [1983] 1 CLJ 178; [1983] CLJ (Rep) 363; [1983] 1 MLJ 151. In that case, Salleh Abas FJ (as he then was) said as follows at pp. 367-368 (CLJ); p. 154 (MLJ):

> In dealing with this question we can do no better than be guided by the statement of the law in Hudson's *Building and Engineering Contracts*, 10th ed., at p. 624, which is as follows:
>
> > It has been seen that, for the purpose of treating the contract as repudiated, in the rare cases where time is of the essence, the contract time for completion may cease to be applicable for a variety of reasons, including the ordering of extras or other interference or prevention by the employer. In the case of damages, it is equally obvious that where the reason is some act of the employer or his architect or engineer preventing completion by the due date, it cannot be the intention of the parties that liquidated or other damages should be calculated from that date even if the act, such as ordering extras, is not a breach of contract. Liquidated damages stipulated for at a rate for each day or week of delay in completing the works must begin to run from some definite date. It follows, therefore, that if the date in the contract has for some such reason ceased to be the proper date for the completion of the works, and no contractual provision exists for the substitution of

> a new date, there is in such a case no date from which liquidated damages can run and the right to liquidated damages will have gone. This, rather than solicitude for the contractor, is the reason for the provision usually known as the extension of time clause. ...
>
> *Amongst the conclusions reached by the learned author after considering these cases is that in cases where an agreement contains no clause for extension of time for completion, the acts of prevention by the employer* whether authorised by the contract or whether in breach of it or whether the prevention is a cause of part or of the whole of the delay invalidate the liquidated damages clause *because by such acts in the words of Parke B. in Holme v. Guppy (supra) and Lord Denning M.R. in Trollope and Colls (supra) "the time becomes at large".* (emphasis added)

When the time becomes at large, the contract needs only to be performed within a reasonable time; see the Supreme Court case of *Thamesa Designs Sdn Bhd & Ors v. Kuching Hotels Sdn Bhd* [1993] 4 CLJ 12; [1993] 3 MLJ 25.

[55] In the Court of Appeal case of *Yeo Liong Ho v. Loh Choon Hooi* [2010] 2 CLJ 580, KN Segara JCA held as follows at pp. 600-601 and 603:

> [16] The vendor's application for the consent to transfer was approved by the State authority on 9 May 1992 and was valid for a period of 12 months from 9 May 1992. *It is patently clear from said letter of approval that the vendor made the said application only on 15 January 1992 almost one year from the date of the execution of the sale and purchase agreement* ...
>
> [32] Documentary evidence have greater evidential value, on a balance of probability, in contrast to any oral testimony of witnesses with regard to determining the *bona fides* of the vendor in attempting to make time the essence of the contract for the payment of the balance of the purchase price, **after time became at large due to the vendor's own delay in obtaining the consent to transfer the property to the purchaser**. These documents include the sale and purchase agreement, letters exchanged between the common solicitors and the solicitors of the purchaser's bank with regard to release of the loan (balance of purchase money), letters of undertaking by the vendor and delays by the vendor in giving such undertaking to the bank for refund of the purchaser's loan amount paid to the vendor (in the event the transfer of the property was rejected for registration), agreement by the vendor to allow the purchaser's bank to submit for registration the transfer and charge even before receipt of the balance of the purchase money by the vendor ...
>
> [34] We are unanimous that the vendor has acted in bad faith and unconscionably in issuing the notice of termination on 19 September 1992 when the balance of the purchase price had already been dispatched from Kuala Lumpur to Penang on 19 September 1992.
>
> [35] *In this sale and purchase transaction the irresistible and inevitable conclusion is that the vendor has failed to demonstrate good faith and a genuine desire to complete the sale and purchase agreement because of more favourable market conditions for the vendor to obtain a higher price for the property*.

A [39] In equity, time is not normally of the essence of a contractual term. However, in three types of cases time is of the essence in equity, namely:

(i) where the contract expressly so stipulates;

(ii) where the circumstances of the case or the subject matter of the contract indicate that the time for completion is of the essence (for
B example, the subject matter of the sale are shares of a company in a volatile market);

(iii) where a valid notice to complete has been given.

[40] *There is no doubt that the sale and purchase agreement did stipulate that time was the essence of the contract. However, when the vendor was not able to obtain the*
C *consent to transfer in the time frame stipulated in the agreement, and the agreement was not terminated by the purchaser, time for completion by the purchaser was necessarily at large*. In the circumstances, can the vendor make time of the essence by the service of a notice to complete, that is, by the letter dated 17 August 1992?

D [41] We are of the view that four requirements have to be satisfied if time for completion is to be made the essence by the service of a notice *viz*:

(i) there must be no breach of the contract by the giver of the notice (the innocent party);

E (ii) the giver of the notice has to be ready, willing and able to complete;

(iii) the other party (the guilty party) has to have been guilty of unreasonable delay well before a notice to complete can be served (however, this requirement may not be applicable where the subject matter of the sale is a hazardous or wasting asset); and

F (iv) the notice when served must limit a reasonable period within which completion is to take place.

(See *British And Commonwealth Holdings Plc. v. Quadrex Holdings Inc.* [1989] 1 QB 842 at 857)

G [42] Upon a careful perusal of the record of appeal and all the evidence adduced at the trial, we are of the view the vendor has not fulfilled requirement (i) and (ii) above and further the purchaser has not been guilty of any delay prior to 17 August 1992. Therefore, we hold that the vendor can no longer make time of the essence by the letter dated 17 August 1992. There was no binding agreement reached for the
H purchaser to pay the balance of the purchase money on or before 17 September 1992 or for the bank to remit to the common solicitors within such a time and manner as to ensure it is received by them on or before 17 September 1992. (emphasis added)

[56] Accordingly, I find and hold that by reason of the conduct of the
I defendant in relation to the removal of the caveat that constituted an act of prevention, the time for completion of 30 October 2013 as prescribed in the agreement was no longer applicable. In other words, time was set at large and the parties are bound only to complete the agreement within a reasonable time beyond 30 October 2013.

Termination Of The Agreement

[57] In the premises, it is plain that the defendant was not entitled to treat the agreement as mutually terminated in reliance on cls. 1A.1 and 1A.3 thereof as communicated to the plaintiff on 20 November 2013. The defendant ought instead to have accepted the offer for an extension of time proposed by the plaintiff on 2 December 2013 to complete the agreement, otherwise the law prescribes reasonable time for completion to be ascertained from the prevailing facts and circumstances.

[58] The defendant's conduct was tantamount to a repudiatory breach and an unlawful attempted termination of the agreement. The repudiation was not accepted by the plaintiff. Hence, the plaintiff being the innocent party was entitled to exercise its rights thereunder including cl. 10.1 of the agreement.

Consequences And Remedies

[59] The plaintiff is, *inter alia*, primarily seeking for a declaration that the agreement was still valid and enforceable and specific performance thereof.

[60] In *LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor* [2007] 2 CLJ 434, Gopal Sri Ram JCA (as he was then) held that:

> The general law is where a promisor wrongfully repudiates a contract in its entirety, the promisee has a choice. He or she may elect to accept the repudiation, treat the contract as at and end and sue for damages. The rationale is that the primary obligation to perform the promise made its substituted with the secondary obligation to compensate the promisee for the breach. Alternatively, he or she may elect to reject the repudiation and treat the contract as subsisting.

I am satisfied that the plaintiff had elected to treat the agreement as subsisting and demonstrated its readiness and willingness to see through the agreement at all material times.

[61] The law on specific performance is codified in s. 21 and s. 23 of the Specific Relief Act 1950 which provide:

> 21. Discretion as to decreeing specific performance
>
> (1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant any such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.
>
> (2) The following are cases in which the court may properly exercise a discretion not to decree specific performance:
>
> (a) where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part; and

A

Illustrations

(a) A contracts to sell to B the interest of C in certain stock-in-trade. It is stipulated that the sale shall stand good, even though it should turn out that C's interest is worth nothing. In fact, the value of C's interest depends on the result of certain partnership-accounts, on which he is heavily in debt to his partners. This indebtedness is known to A, but not to B. Specific performance of the contract should be refused to A.

B

(b) A contracts to sell, and B contracts to buy, certain land. To protect the land from floods, it is necessary for its owner to maintain an expensive embankment. B does not know of this circumstance, and A conceals it from him. Specific performance of the contract should be refused to A.

C

(c) A's property is put up to auction. B requests C, A's attorney, to bid for him. C does this inadvertently and in good faith. The persons present, seeing the vendor's attorney bidding, think that he is a mere puffer and cease to compete. The lot is knocked down to B at a low price. Specific performance of the contract should be refused to B.

D

(b) where the performance of a contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

E

Illustrations

(a) A and B, trustees, join their beneficiary, C, in a contract to sell the trust-estate to D, and personally agree to exonerate the estate from heavy incumbrances to which it is subject. The purchase money is not nearly enough to discharge those incumbrances, though, at the date of the contract, the vendors believed it to be sufficient. Specific performance of the contract should be refused to D.

F

G

(b) A contracts with B to sell him certain lands, and to make a road to it from a certain railway-station. It is found afterwards that A cannot make the road without exposing himself to litigation. Specific performance of the part of the contract relating to the road should be refused to B, even though it may be held that he is entitled to specific performance of the rest with compensation for loss of the road.

H

(c) A, a lessee of mines, contracts with B, his lessor, that at any time during the continuance of the lease B may give notice of his desire to take the machinery and plant used in and about the mines, and that he shall have the articles specified in his notice delivered to him at a valuation on the expiry of the lease. Such a contract might be most injurious to the lessee's business, and specific performance of it should be refused to B.

I

(d) A contracts with B to buy from B's manufactory and not elsewhere all the goods of a certain class used by A in his trade. The court cannot compel B to supply the goods, but if he does not supply them A may be ruined, unless he is allowed to buy them elsewhere. Specific performance of the contract should be refused to B.

(3) A case in which the court may properly exercise a discretion to decree specific performance is where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

Illustrations

A sells land to a railway company, who contract to execute certain works for his convenience. The company take the land and use it for their railway. Specific performance of the contract to execute the works should be decreed in favour of A." and

23. Personal bars to the relief

Specific performance of a contract cannot be enforced in favour of a person:

(a) who could not recover compensation for its breach;

Illustrations

A, in the character of agent for B, enters into an agreement with C to buy C's house. A is in reality acting not as agent for B but on his own account. A cannot enforce specific performance of this contract.

(b) who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed;

Illustrations

(a) A contracts to sell B a house and to become tenant thereof for a term of fourteen years from the date of the sale at a specified yearly rent. A becomes insolvent. Neither he nor the official receiver of his estate can enforce specific performance of the contract.

(b) A contracts to sell B a house and garden in which there are ornamental trees, a material element in the value of the property as a residence. A, without B's consent, fells the trees. A cannot enforce specific performance of the contract.

(c) A, holding land under a contract with B for a lease, commits waste, or treats the land in an unhusbandlike manner. A cannot enforce specific performance of the contract.

(d) A contracts to let, and B contracts to take, an unfinished house, B contracting to finish the house and the lease to contain covenants on the part of A to keep the house in repair. B finishes the house in a very defective manner: he cannot enforce the contract specifically, though A and B may sue each other for compensation for breach of it.

A (c) who has already chosen his remedy and obtained satisfaction for the alleged breach of contract; or

Illustrations

A contracts to let, and B contracts to take, a house for a specified term at a specified rent. B refuses to perform the contract. A thereupon sues
B for, and obtains, compensation for the breach. A cannot obtain specific performance of the contract.

(d) who, previously to the contract, had notice that a settlement of the subject-matter thereof (though not founded on any valuable consideration) had been made and was then in force.

C **[62]** It is a discretionary remedy and Abdul Malik Ishak JCA in the Court of Appeal case of *MMI Industries Sdn Bhd v. Let Sin Industries Sdn Bhd* [2010] 1 CLJ 36 said as follows at pp. 47 and 49:

[11] **It is imperative that the party seeking specific performance must**
D **show to the satisfaction of the court that he is ever ready and willing to perform the contract.** Seah FJ in *Ganam d/o Rajamany v. Somoo s/o Sinnah* spoke of the need of the plaintiff to be in a state of "continuous readiness and willingness, ... to perform the contract". Section 23(b) of the Specific Relief Act 1950 (Act 137) bars specific performance of a contract in favour of a person who has become incapable of performing, or violates,
E any essential term of the contract that on his part remains to be performed. Here, it will be demonstrated later that the plaintiff was in a continuous state of readiness to perform the SPA.

[22] On 22 June 2006, the plaintiff deposited the balance of the purchase price with its solicitors and was thus ready and willing to complete the SPA. This shows that the plaintiff could have completed the sale on that
F day but was prevented from doing so because of the defendant's encroachment on Textile's land. Without a doubt, the plaintiff has discharged its onus of proving readiness and willingness to perform its part of the bargain under the SPA continuously from the date the SPA was executed till the date of the disposals of encls. 9 and 19 (*Pakharsingh v. Kishansingh* AIR [1974] Raj 112). **On the part of the plaintiff, it was**
G **a case of a continuous state of readiness and willingness to perform the SPA.** (emphasis added)

[63] In the premises, I have no reservation not to grant the declaration as sought and specific performance of the agreement to the plaintiff.

H **[64]** Besides specific performance, the plaintiff has also sought for further reliefs including damages and refund of the 10% of the deposit paid by the plaintiff that has been retained by the defendant without any valid reason notwithstanding that the defendant had treated the agreement as terminated.

[65] Although specific performance was sought, the plaintiff is concerned
I with the ability of now procuring and obtaining the consent to transfer of Lot 9177 from the State authority. In this regard, the plaintiff referred to the Federal Court case of *Chin Tai v. Siow Shiow & Ors* [1970] 1 LNS 15; [1971] 1 MLJ 67 where HT Ong CJ held as follows at p. 69:

> The only impediment to a transfer by way of specific performance as prayed in the counterclaim, is a requirement of the necessary permission. In the circumstances I think the application for such permission may be made by the first defendant, supported by a copy of this judgment as grounds of her application and by virtue of the agreement. In the event of permission being granted and the plaintiff failing after 14 days of notice received to execute a registrable transfer the Assistant Registrar of this court is to do so in her place and call for surrender of the issue document of title by the plaintiff.
>
> *Should permission, however, be refused, the first defendant should be entitled alternatively to damages – being the amount of the first defendant's outlay expended in developing the land. This may be ascertained upon inquiry by the Assistant Registrar ...* (emphasis added)

It was also pointed out by the plaintiff that the Court of Appeal in *MMI Industries Sdn Bhd v. Let Sin Industries Sdn Bhd (supra)* made the following contingency orders:

> [102] *There shall be judgment for the appellant for specific performance of the SPA by the respondent, with an abatement of the balance purchase price in respect of all sums paid to the respondent as rent from February 2006, together with all ancillary orders deemed necessary for the parties to complete the SPA. In the event the State Authority's approval is not granted, damages is ordered against the defendant to be assessed.* The period of "seven days" stipulated in paragraph 30.3 a. and 30.3 b. of the statement of claim shall be substituted with "one month". However, there shall be no ancillary order in terms of paragraph 30.3 c. namely, "That in the event State Authority Approval is not obtained within six months, the SPA will be deemed terminated and the defendant shall return to the plaintiff within seven days the sum of RM59,000". (emphasis added)

[66] As for damages, the plaintiff did not adduce cogent evidence at the trial as to the consequence of the deprivation of use of the properties since the original completion date of 30 October 2013. The plaintiff only brought up the loss of use of the RM1 million deposit that was not refunded by the defendant.

[67] The non refund of the RM1 million is a given as there is no basis whatsoever for the defendant retaining and making use of the money. I am perplexed by the stance taken by the defendant which smacks of utter bad faith. This is not only with regards to the non refund of the deposit but also the defendant's feeble justification for the non resolution of this case. This is seen from my clarification with DW1 during her cross examination and subsequent re-examination at the trial on 14 January 2015 as follows:

> Counsel for third parties: Miss Ong, that's not my question. My question is, would you agree with me actually you should be quite happy that my client delay, otherwise you would have no chance of termination.

A DW1: No. I don't agree.

Counsel for Third Parties: You don't agree. Thank you. I will move on.

YA: I mean this is where I am confused. If that is the case why don't you settle the case by giving the land now to the plaintiff?

B Counsel for the Third Parties: Exactly My Lord. We are also very confused.

YA: Because you say you want to go through the sale right but it was because of the delays, the transaction got terminated, but the plaintiff still wants to perform it. Now, the ball is on your court. So, if you want to perform it then the case is resolved. Sell the land to them, you get the
C money, the lawyers also walk away. So, why are we still here? That is where I ask you just now, why not resolve this case by selling the land now.

DW1: Yes, because as we know the agreement has already expired.

D YA: I know but by agreement, I can order that it can be revised. Will it solve the problem?

DW1: Yes, but we would like to, on second thought we would like to keep the property you see.

YA: That's different.

E Counsel for the Defendant: Before you answer that, I want to know, in the first place, back in 2013, why did the company decide to sell the two properties? Can you explain to the court, why?

DW1: Because we needed the money to run our other businesses. That's the reason why we sell the property.

F Counsel for the Defendant: Alright. Then at the end of 2013, about October, after the expiry and there was an offer by the Plaintiff to extend the time for you to complete so that you can collect the money, which you say you need so much, then why didn't you take up the offer and proceed and complete the transaction?

G DW1: Strictly business decision. Business has improved. The other operations are renting from third party in Teluk Gong. So, instead of renting from people and paying high rentals, so we decided when this agreement has expired, that we should actually move back to our premises. So, that's the reason why we did not want to accept the offer.

H **[68]** It is therefore obvious that the defendant wanted to renege from the agreement after the defendant had executed it. This is similar to what happened in *Yeo Liong Ho v. Loh Choon Hooi (supra)* save that it was for a more favourable re-sale due to improved market conditions there compared to the defendant's intended own use here. In either case, it was wrong and
I inexcusable. The defendant's conduct was certainly unconscionable. It is also probable to me that the money the defendant desperately required to run its business was funded by the RM1 million deposit of the plaintiff. This

subsequently led to the change in the defendant's business fortune as well as the subsequent change of heart of the defendant in respect of selling the properties.

[69] In *Tengku Abdullah ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals* [1997] 2 CLJ 607; [1996] 2 MLJ 265, Gopal Sri Ram JCA (as he then was) said as follows at pp. 670-671 (CLJ); pp. 324-325 (MLJ):

> Yet the maxim of the law is *ubi jus ibi remedium. If a wrong is found to have occurred in circumstances which disclose an abuse of confidence in respect of which a court of equity may grant relief, it is open to the court to grant such relief as would meet the ends of justice. This is the core of equity jurisprudence which was invented to mitigate the rigours of the common law.* To demand, in the circumstances adumbrated a moment ago, that rescission be the sole remedy, *albeit* that its grant may cause as much, if not greater, harm than that inflicted by the wrongdoer, will denude equity jurisprudence – whether in point of right or remedy – of the very flexibility which the courts have strived to achieve in order to dispense justice according to the facts of a given case. The proposition that equity, in keeping with its flexibility, moulds the relief that ought to be granted in a particular case to meet the justice of that case is well supported by authority.
>
> In *Gluckstein v. Barnes* (1900) AC 240, the House of Lords rejected the identical argument as here advanced by Allied, Lord Macnaghten treating the point as being settled. He said (at p 249):
>
> > The third ground of defence was that the only remedy was rescission. That defence, in the circumstances of the present case, seems to me to be as contrary to common sense as it is to authority. The point was settled more than 60 years ago by the decision in *Hichens v Congreve* (1831) 58 ER 157 and, so far as I know, that case has never been questioned.
>
> Raja Aziz has also drawn our attention to *Dusik v Newton* (1985) 62 BCLR 1, a decision of the Court of Appeal of British Columbia. The joint judgment of the court contains much learning upon the subject of unconscionable bargains. On the flexibility of equitable remedies, particularly in the context of the remedy of rescission, we think it appropriate to reproduce the following passage from that judgment:
>
> > Where rescission is impossible or inappropriate, it would be inequitable for the defendant to retain the benefits of the unconscionable bargain. As Dickson J (as he then was) stated in *Pettkus v Becker* [1980] 117 DLR (3d) 257 at p 273:
> >
> > > *The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice.*

A

> *In the instant case, it would be unjust to allow the board to employ technical arguments in order to preserve the fruits of its unconscionable actions.* To echo the words of Davey JA in *Morrison v Coast Fin Ltd* [1965] 55 DLR (2d) 710 at p 716: 'I cannot believe that the law is so deficient that it cannot reach and remedy such a gross abuse of overwhelming inequality between the parties. (emphasis added)

B

[70] In this regard, the defendant has undoubtedly been unjustly enriched by holding on and benefited from the unauthorised usage of the deposit of RM1 million. If specific performance of the agreement is granted, only then the deposit would go towards the payment for the properties. In the

C

meantime, the defendant had wrongly and unjustly benefited from the free use of the deposit sum.

[71] Consequently, I am of the view that this is an appropriate case to award exemplary damages to the plaintiff because of the defendant's

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repugnant conduct for committing repudiatory breach of contract that was self engineered in attempt to extricate itself from the agreement as well as for unjust enrichment by unlawfully withholding the refund of the deposit for its own profitable use. In this respect, I refer to the *dicta* of Low Hop Bing JCA in the Court of Appeal case of *Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd* [2009] 6 CLJ 626 at pp. 650-651:

E

> [78] I shall now consider the plaintiff's cross-appeal against the dismissal of the plaintiff's claim for exemplary and aggravated damages. *Now, before damages can be recovered in an action there must be a wrong committed and that wrong may be in tort or, like the present appeal, for breach of contract.* Even if a loss has been incurred, damages cannot be awarded in the absence of a

F

> wrong. Lord Wright aptly said in *Hay* or *Bourhill v. Young* [1943] AC 92, at p. 106:
>
> > Damage due to the legitimate exercise of a right is not actionable, even if the actor contemplates the damage. It is *damnum absque injuria*. The damage must be attributable to the breach by the

G

> > defendant of some duty owing to the plaintiff.
>
> [79] So, the preliminary question to pose before any issue of damages can arise is this: whether a wrong has been committed? Put differently, has the plaintiff proved the defendant's liability?
>
> [80] The purpose of exemplary damages is to punish. And the quantum

H

> of the exemplary damages may be influenced by the size of the compensation sought even to the extent of exceeding the size of the compensation itself. In *Rookes v. Barnard And Others* [1964] AC 1129, at p. 1228, Lord Devlin observed that:
>
> > ... a jury shouId be directed that if, but only if, the sum which they

I

> > have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum.

> [81] In *Bradford City Metropolitan Council v. Arora* [1991] 2 QB 507, CA, the Court of Appeal while acknowledging that exemplary damages should be awarded only where compensatory damages are inadequate to punish the defendant, upheld an exemplary award of the industrial tribunal.
>
> [82] In *Sallows v. Griffiths* [2001] FSR 15, CA, the court refused to order exemplary damages because it considered that the compensatory award was adequate. In *Drane v. Evangelou And Others* [1978] 1 WLR 455, CA, both Lawton and Goff LJJ thought it was justifiable to amalgamate aggravated damages with exemplary damages. (emphasis added)

[72] In *Rookes v. Barnard* [1964] AC 1129, Lord Devlin said as follows at 1228 in respect of the amount of exemplary damages that can be awarded:

> A jury should be directed that if, but only if, the sum which may have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum.

Very recently the court of appeal in *Ketua Polis Daerah Sentul & Ors v Norizan binti Salleh* (2015) unreported upheld the High Court's, award of exemplary damages of RM200,000 for a wrongful tort. In the computation of the amount, I am further entitled to take into consideration the benefit derived by the defendant for free use of the RM1 million for about a year and a half.

[73] I do not condone the actions of the defendant and hold that the defendant must accordingly pay exemplary damages here to the plaintiff. This is the stern warning to the defendant that its repugnant conduct must never be repeated.

Negligence Of The Third Parties

[74] The complaint of the defendant is basically that the non obtaining of the consent for transfer by 30 October 2013 was due to the delay and hence the negligence of the third parties and in the circumstances, the defendant was entitled to commence a third party action against the third parties following *Hong Leong Nominees Sdn Bhd & Anor v. Tommy Lim Boon Cheow & Anor; Lachaman Lalchand & Assoc (Third Party)* [2000] 1 CLJ 125 for indemnity.

[75] From the foregoing facts and circumstances as found, I find that the delay was in fact caused by the defendant itself and not the third parties. Thus although the third parties owed a two pronged duty of care to the defendant following *Dato Wong Gek Meng v. Pathmanathan Mylvaganam & Ors* [1998] 1 CLJ 625; [1998] 5 MLJ 560, I find and hold that the third parties did not breach that duty of care. The third ingredient on loss and damage is contingent upon what is awarded to the plaintiff which may include damages and costs. Consequently, the relief for indemnity or contribution as sought by the defendant against the third parties for negligence must necessarily fail because one of the three essential ingredients of the tort was not established.

A

Conclusion

[76] Based on the aforesaid reasons, I therefore enter judgment for the plaintiff against the defendant in respect of prayers (i), (ii), (iii), (iv) and (v) of para. 23 of the statement of claim with the additional conditions that the application to obtain the consent to transfer Lot 9177 be made by the
B defendant within a month from the date of the service of the sealed order on the defendant and the new completion date of the agreement is fixed at nine months from the service of the sealed order on the defendant. If the consent to transfer Lot 9177 is refused by the State authority, the plaintiff it is entitled alternatively to damages to be assessed by the Registrar and that the
C defendant shall bear the goods and services tax, if any, imposed upon the transfer of the properties. In addition, the defendant shall pay the plaintiff exemplary damages pursuant to prayer (vi) of para. 23 of the statement of claim for the sum of RM250,000 with interest thereon at 5% per annum from 16 June 2014 till full realisation. The defendant's counterclaim is dismissed.
D I award costs of RM60,000 to the plaintiff.

[77] I further dismiss the defendant's claim against the third parties with costs of RM30,000.

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